

2009

Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum

Robert Hornstein

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Hornstein, Robert (2009) "Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum," *William Mitchell Law Review*: Vol. 35: Iss. 3, Article 1.
Available at: <http://open.mitchellhamline.edu/wmlr/vol35/iss3/1>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

**TEACHING LAW STUDENTS TO COMFORT THE
TROUBLED AND TROUBLE THE COMFORTABLE:[†]
AN ESSAY ON THE PLACE OF POVERTY LAW IN THE
LAW SCHOOL CURRICULUM**

Robert Hornstein^{††}

*I walked a mile with Pleasure;
She chattered all the way,
But left me none the wiser
For all she had to say.*

*I walked a mile with Sorrow
And ne'er a word said she;
But oh, the things I learned from her
When Sorrow walked with me.¹*

In September of 2008, Associate Supreme Court Justice Antonin Scalia addressed a gathering of the Federalist Society at Chicago's Union League Club.² In his address, Scalia reminisced about his days as a law student and shared with his audience that

[†] Steven Banks, the Attorney-in-Chief of the Legal Aid Society in New York City, used this phrase in an interview he gave to journalist Elizabeth Kolbert in 1999 for an article in *The New Yorker* magazine about the plans of New York City Mayor Rudolph Giuliani to throw uncooperative families out of New York City's homeless shelters. See Elizabeth Kolbert, *Around City Hall*, THE NEW YORKER, Dec. 17, 1999, at 40. Banks used the phrase to describe his work as a poverty lawyer representing New York City's homeless. See *id.*

^{††} Assistant Professor of Law, Florida Coastal School of Law. The author thanks Professor Christopher Roderer, Daniel Atkins, and Maria Soto for their many valuable comments. Special thanks to my wife, Corrine Hornstein, for tirelessly reading the earlier drafts and for her wise insights.

1. Robert Browning Hamilton, *Along the Road*, in FIRST LOVES: POETS INTRODUCE THE ESSENTIAL POEMS THAT CAPTIVATED & INSPIRED THEM 27 (2002).

2. Abdon M. Pallasch, *Scalia Says U. of C. Has Gone Liberal*, CHI. SUN TIMES, Sept. 17, 2008, available at <http://www.suntimes.com/news/education/1168064,scalia091708.article>.

when he was in law school, he “took nothing but bread-and-butter classes, not ‘Law and Poverty,’ or other made-up stuff.”³ Justice Scalia also counseled his audience on what courses he thinks law students should be taking in law school.⁴ According to Justice Scalia, law students should “take serious classes.”⁵ As for the rewards of taking a course such as poverty law, he cautioned: “Don’t waste your time.”⁶ So, in sharing this advice, did Justice Scalia in some way mean to suggest that the legal interests of the poor should rightfully occupy a peripheral, or perhaps even inferior, place in legal education and the legal system? Regrettably, this may be the case.⁷

Justice Scalia has previously signaled how he values the legal interests of the poor. His dissenting opinion in *Legal Services Corporation v. Velazquez*⁸ offers a measure of insight into where he would place his thumb on the scales of justice in weighing the poor’s legal interests, and in particular, how Justice Scalia calibrates equal access to legal counsel for the poor. In *Velazquez*, the Court struck down a legislative restriction that prohibited federally funded Legal Services Corporation (“LSC”) program lawyers from undertaking representation in cases that involve “an effort to amend or otherwise challenge existing welfare law.”⁹ The LSC promulgated a regulation that prohibited LSC lawyers from challenging the constitutionality of welfare laws on behalf of their impoverished clients.¹⁰ Justice Anthony Kennedy, writing for the majority, rejected the argument that the statutory provision prohibiting LSC lawyers from raising constitutional challenges was essentially harmless because the LSC lawyer could withdraw from representation.¹¹ Justice Kennedy found the remedy of withdrawal

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. See, e.g., Peter B. Edelman, *Justice Scalia’s Jurisprudence and the Good Society: Shades of Felix Frankfurter and the Harvard Hit Parade of the 1950’s*, 12 CARDOZO L. REV. 1799, 1801 (1991) (describing how Justice Scalia’s jurisprudence of neutral principles often results in a lack of judicial protection for the poor); Toby Golick, *Justice Scalia, Poverty and the Good Society*, 12 CARDOZO L. REV. 1817, 1817–18 (1991) (arguing Justice Scalia’s conception of the proper arrangement of our governmental structure precludes the poor from seeking aid from the courts in enforcing statutory rights to governmental benefits).

8. 531 U.S. 533 (2001).

9. *Id.* at 537.

10. *Id.* at 538–39.

11. *Id.* at 546.

“even more problematic because in cases where the attorney withdraws from a representation, the client is unlikely to find other counsel.”¹² The likelihood of such a result troubled Justice Kennedy because the “explicit premise for providing LSC attorneys is the necessity to make available representation ‘to persons financially unable to afford legal assistance.’”¹³

Writing in dissent, however, Justice Scalia was not troubled by the possibility that an impoverished person could not find substitute counsel. According to Justice Scalia, the possibility that a poor person would be unable to retain substitute counsel “is surely irrelevant, since it leaves the welfare recipient in no *worse* condition than he would have been in had the LSC program never been enacted [because] . . . even if welfare claimants cannot obtain a lawyer anywhere else, the Government is not required to provide one.”¹⁴ For Justice Scalia, no matter how severely the statutory restriction trenches upon the ability of LSC lawyers to provide an equal measure of meaningful representation for the poor, there nevertheless is no constitutional foul.¹⁵ This is so since in the first instance, the poor’s access to legal counsel through the LSC is nothing more or less than a matter of legislative grace.¹⁶

Justice Scalia’s view that poverty law is not a serious course echoes a nagging truth: poverty law and the broader concern of social justice have always held a sort of second-class citizenship within the modern architecture of the law school curriculum and in the legal academy as well.¹⁷ The historical pedigree of Justice

12. *Id.*

13. *Id.* (citing 42 U.S.C. § 2996a(3) (2001)).

14. *Id.* at 557 (Scalia, J., dissenting).

15. *See id.*

16. *Id.*

17. *See, e.g.,* M. H. Hoeflich, Symposium, *Introduction*, 38 EMORY L.J. 565, 568–70 (1989) (explaining poverty law is not as promising a field of study for theoretical scholarship and is usually considered peripheral to the core curriculum); Emily J. Sack, *The Burial of Family Law*, 61 SMU L. REV. 459, 479 n.128 (2008) (explaining that one of family law’s characteristics as a gender-identified course is that, like poverty law, it traditionally has been considered “softer” law, as compared to core subjects such as constitutional law, evidence and corporations); Amy L. Wax, Symposium, *Musical Chairs and Tall Buildings: Teaching Poverty Law in the 21st Century*, 34 FORDHAM URB. L.J. 1363, 1363 (2008) (stating that “[p]overty has never been considered a mainstream part of the law school curriculum; nor has it commanded a central place in legal scholarship.”). *See also* Jerold S. Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 N.Y.U. L. REV. 457, 471 (1978) (discussing how clinical professors “seem to float at the margin of their professional culture” and “are considered less intellectual and less academic”); Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 MCGEORGE L. REV.

Scalia's view is inextricably bound up with the question of the proper role and function of law schools, and for that matter, the law itself.¹⁸ Poverty law, while having both a doctrinal and clinical presence in the academy and the law school curriculum for several decades now, has yet to enjoy complete academic acceptance.¹⁹ To this day, it continues to occupy what has been described as a peripheral presence in the law school curriculum.²⁰

Rather than being consigned to the margins of the law school curriculum, however, poverty law and social justice should be prominent fixtures in legal education and should be central institutional concerns of the nation's law schools. More precisely, poverty law should be a required and animating element of today's law school curriculum. The reasons why are drawn not from the classroom but from the pages of history and the pressing demands of civil society. In a political instant, hundreds of billions of dollars in *corporate welfare* is dispensed to the architects of the subprime mortgage crisis and to our nation's largest banks and insurers,²¹ but years are devoted to debating the wisdom of providing poor families and children with a stronger safety net.²² For decades, corporate chief executives were handsomely rewarded for leadership that resulted in harm to their companies and the loss of thousands of jobs.²³ But only now that the nation faces economic

603, 625 (2007) (noting that historically, clinical legal education has had a subordinate status in the academy).

18. See, e.g., Stephen Wizner, *Is Learning to "Think Like a Lawyer" Enough?*, 17 YALE L. & POL'Y REV. 583, 583, 591 (1998) (questioning whether law schools are "educating students for technical proficiency, but failing to inculcate in them a proper sense of their social and public responsibilities as members of the legal profession" and arguing that "law schools, and particularly law teachers, have a 'moral responsibility' to democratize our legal culture.") [hereinafter Wizner, *Is Learning*].

19. See Hoeflich, *supra* note 17, at 570; Wax, *supra* note 17, at 1363.

20. See Hoeflich, *supra* note 17, at 570; Wax, *supra* note 17, at 1363.

21. See Edmund L. Andrews & Eric Dash, *Insurers and Automakers in Time for Bailout*, N.Y. TIMES, Oct. 25, 2008, at B1; Edmund L. Andrews & Eric Dash, *Insurers Are Getting in Line for Piece of Federal Bailout*, N.Y. TIMES, Oct. 25, 2008, at B1; Bob Herbert, Op-Ed., *Lost in a Flood of Debt*, N.Y. TIMES, Nov. 24, 2007, at A17; Andrew Ross Sorkin, *G.M. Speeds Hat in Hand to Treasury*, N.Y. TIMES, Oct. 27, 2008, at B1. See also David Super, *The Political Economy of Entitlement*, 104 COLUM. L. REV. 633 (2004) (detailing the debate surrounding the passage of 1996 welfare reform); Bob Herbert, Op-Ed., *A Swarm of Swindlers*, N.Y. TIMES, Nov. 20, 2007, at A23; Julie Scelfo, *After the House Is Gone*, N.Y. TIMES, Oct. 23, 2008, at D1.

22. See Peter S. Goodman, *From Welfare Shift in '96, '08 Reminder for Clinton*, N.Y. TIMES, Apr. 11, 2008, at A1; Rachel L. Swarns, *State Programs Add Safety Net for the Poorest*, N.Y. TIMES, May 12, 2008, at A1.

23. See Jenny Anderson, *Congress Questions Executives on Pay*, N.Y. TIMES,

collapse has this paradox of executive performance and compensation been called into serious question. Nearly thirty-seven million Americans live in poverty and many millions more dwell within a week's wage of poverty.²⁴ The economic peril that the country currently faces reveals the fragility of our conventional measures and definitions of poverty. Around the world, 1.4 billion people subsist on slightly more than one dollar a day.²⁵ The American worker is more productive than ever before, but more economically vulnerable to poverty.²⁶ Over forty-seven million Americans lack access to healthcare insurance and millions more lack adequate access.²⁷ Beyond the anonymity of these statistics, it is possible for a child in America to die for want of access to dental care—for no reason other than poverty.²⁸ These social and economic conditions present a compelling tableau of reasons why there is both a place in the law school curriculum for the study of poverty law, and a pressing and critical educational, professional, and public need. This Essay addresses the role and place of poverty law in today's law school curriculum.

Before I proceed further, I wish to make three preliminary acknowledgments. First, I want to recognize the rich, textured, and elegantly thoughtful body of scholarship on poverty law that has been produced over the last five decades. Consequently, this Essay does not arrive on a fresh canvas. Quite to the contrary, it draws upon and benefits greatly from the wisdom and insights of the many scholars, both doctrinal and clinical, as well as poverty law practitioners, who have contributed to the development of that body of work. For this reason, and as a matter of blunt candor, I

Mar. 7, 2008, available at <http://www.nytimes.com/2008/03/07/business/07cnd-pay.html>; Sheryl Gay Stolberg & Stephen Labaton, *Banker Bonuses Are "Shameful," Obama Declares*, N.Y. TIMES, Jan. 30, 2009, at A1.

24. CTR. ON BUDGET AND POLICY PRIORITIES, POVERTY AND HARDSHIP AFFECT TENS OF MILLIONS OF AMERICANS (2007), <http://www.cbpp.org/12-20-07pov.pdf>.

25. In August of 2008, the World Bank estimated 1.4 billion people in the developing world live on less than \$1.25 a day. The World Bank, *New Data Show 1.4 Billion Live on Less Than US \$1.25 a Day, But Progress Against Poverty Remains Strong*, Aug. 26, 2008, <http://go.worldbank.org/K3Z8CEDJ10>.

26. See, e.g., Erik Eckholm, *Working Poor and Young Are Hit Hard in Economic Downturn*, N.Y. TIMES, Nov. 9, 2008, at A26. See Steven Greenhouse & David Leonhardt, *Real Wages Fail to Match a Rise in Productivity*, N.Y. TIMES, Aug. 28, 2006, at A1.

27. CTR. ON BUDGET AND POLICY PRIORITIES, NUMBER AND PERCENTAGE OF AMERICANS WHO ARE UNINSURED CLIMBS AGAIN (2007), <http://www.cbpp.org/8-28-07pov.pdf>. See also Mary Otto, *Hidden Hurt*, WASH. POST, Nov. 9, 2008, at W08.

28. Mary Otto, *For Want of a Dentist*, WASH. POST, Feb. 28, 2007, at B1.

disclaim any pretense of originality. Second, I make no attempt nor lay any claim to providing a full accounting of the literature in the narrow space of this Essay. Third, this Essay is animated as much by the experiences that informed my life as a poverty lawyer as by pedagogical concerns and interests.

Returning to Justice Scalia's appearance at the Chicago Union League in September 2008, his explanation of why law students should not take courses that address the legal needs of the poor puts into clear focus one of the most enduring criticisms of poverty law—that it is not a legitimate area of legal study. For this reason, Justice Scalia's reprove that poverty law is “made-up stuff,”²⁹ offers a useful starting point, which is the often difficult matter of defining poverty law. Professor Martha Davis, in her recent article, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*,³⁰ which appeared in a recent Symposium issue of the Fordham Urban Law Journal on the role of poverty law in today's law school curriculum, noted that almost four decades ago, Professor Thomas Quinn began a poverty law teaching conference by posing the question: “What is poverty law?”³¹

Professor Amy Wax, another contributor to the same Symposium, observed that:

Because poverty law is not a core part of a traditional legal education, it has no standard, agreed-upon curriculum. What is taught in poverty law is up for grabs and is heavily influenced by the interests and convictions of the faculty instructor. Not surprisingly, courses are highly variable, and their contents have evolved in response to political developments and shifting notions on the causes and cures of economic disadvantage.³²

A third participant in the Symposium, Professor Stephen Loffredo, explained that poverty law “now carries an array of overlapping meanings.”³³ Notably, however, each of these three observations—by scholars who have written and thought about the contours and importance of poverty law for many years—reveals that the task of setting out a uniform and universally accepted

29. Pallasch, *supra* note 2.

30. Martha F. Davis, Symposium, *The Pendulum Swings Back: Poverty Law in the Old and New Curriculum*, 34 FORDHAM URB. L.J. 1391, 1393 (2007).

31. *Id.*

32. Wax, *supra* note 17, at 1364.

33. Stephen Loffredo, Symposium, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1240 (2007).

definition of poverty law is probably not achievable in any normative sense.

Nevertheless, as used in this Essay, poverty law is not divorced from the formal canonical subjects, structures, and conventions that underlie our legal system. Poverty law instead embraces a broad field of substantive and procedural inquiry directed at learning and understanding how and why existing legal structures and ordinary legal conventions can disadvantage the poor as well as what legal mechanisms can aid the poor. As I use the term “poverty law” in this Essay, it embraces teaching students to use their technical competencies as lawyers to address and to remediate those disadvantages that burden the poor. And for this reason, poverty law, as used in this Essay, necessarily embraces teaching law students to care about justice and equality, teaching them that justice and equality matter, and to pursue both in the course of their lives as lawyers. As Professor Bryan Stevenson eloquently stated, “[t]he opposite of poverty is not wealth,” it is “justice.”³⁴ This simple truth lies at the heart of any definition of poverty law.

A broader question, however, is what, if anything, does justice have to do with the mission of law schools and legal education?³⁵ Legal education for the past three centuries has been neither a fixed or static process.³⁶ While law schools in many respects have been tradition bound regarding both the content of the standard curriculum and the academic study model of legal education, the last few decades have witnessed a number of significant changes.

34. Andrea Saenz, *Hundreds Gather for Celebration of Public Interest*, HARV. L. RECORD, Mar. 20, 2008, at News, available at <http://media.www.hlrecord.org/media/storage/paper609/news/2008/03/20/News/Hundreds.Gather.For.Celebration.Of.Public.Interest-3278485.shtml>.

35. Three decades ago, Professor Jerold Auerbach examined this question in an insightful article entitled *What Has the Teaching of Law To Do with Justice?*. See generally Auerbach, *supra* note 17.

36. See generally Talbot D'Alemberte, *Teaching About Justice and Social Contributions*, 40 CLEV. ST. L. REV. 363 (1992); Russell Engler, *From 10 to 20: A Guide to Utilizing the MacCrate Report Over the Next Decade*, 23 PACE L. REV. 519 (2003); Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1 (1996); Janeen Kerper, *Creative Problem Solving vs. the Case Method: A Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf*, 34 CAL. W. L. REV. 351 (1998); John O. Sonsteng, Donna Ward, Colleen Bruce & Michael Petersen, *A Legal Education Renaissance: A Practical Approach for the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303 (2007); Stephen Wizner, *What Is a Law School?*, 38 EMORY L.J. 701 (1989); ABA, Section of Legal Education and Admissions to the Bar, *MacCrate Report, An Educational Continuum: Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, July 1992, <http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html>.

Lawyering skills, clinical and externship programs, the expansion of elective courses, the establishment of legal writing programs, a greater emphasis on professionalism, and a movement toward bridging the gap between doctrinal instruction and skills instruction are all easily recognizable signposts in virtually every American law school today.³⁷ Law schools, members of the academy, and other interested stakeholder organizations continue to recognize that new approaches are needed to educate and prepare law students for the practice of law.³⁸ Yet, while the precise contours of the standard curriculum have and continue to undergo change, curricular change has not yet led to a full embrace or endorsement of a social justice mission for law schools. Professor William Quigley argues that social justice is a “counter-cultural value” in law school and the legal profession.³⁹

37. See generally Kara Abramson, “Art for a Better Life:” A New Image of American Legal Education, 2006 B.Y.U. EDUC. & L.J. 227 (2006); Jessica Dopierala, *Bridging the Gap Between Theory and Practice: Why Are Students Falling Off the Bridge and What Are Law Schools Doing to Catch Them?*, 85 U. DET. MERCY L. REV. 429 (2008); Robert A. Stein, *The Future of Legal Education*, 75 MINN. L. REV. 945 (1991); Nicholas S. Zeppos, *2007 Symposium on the Future of Legal Education*, 60 VAND. L. REV. 325 (2007).

38. See, e.g., Symposium, *Taking Law and ___ Really Seriously: Before, During and After “The Law,”* 60 VAND. L. REV. 555 (2007); WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) (prepared by the Carnegie Foundation for the Advancement of Teaching) [hereinafter CARNEGIE STUDY]. The Carnegie Study found that “law schools could benefit from ideas drawn from the education of physicians, teachers, nurses, engineers, and clergy” *Id.* at 185. The authors of the study highlighted the absence of a sufficiently strong bridge between legal thinking and the application of that knowledge to day-to-day practice concerns. *Id.* at 188. A second key limitation is a lack of attention to developing “the ethical and social dimensions of the profession.” *Id.* While the study does not address social justice or poverty law as a separate element, it does examine the need for the educational process to account for the moral and ethical development of students in the context of what the authors describe as the “apprenticeship of professionalism.” *Id.* at 126–39. In this context, the study touches briefly on the potential of pro bono work as an ingredient in the calculus of students’ moral development. *Id.* at 138. See also Russell Engler, *The MacCrate Report Turns 10: Assessing Its Impact and Identifying Gaps We Should Seek to Narrow*, 8 CLINICAL L. REV. 109, 115 (2001) (quoting Gary Bellow, *On Talking Tough to Each Other: Comments on Condlin*, 33 LEGAL EDUC. 619, 622 (1983)) (explaining that by the mid-1980s, then current methods of education “[did] not properly prepare students to practice law.”); Irene Scharf, *Nourishing Justice and the Continuum: Implementing a Blended Model in an Immigration Law Clinic*, 12 CLINICAL L. REV. 243, 274 (2005) (noting that students who participate in the Southern New England School of Law Immigration Law Clinic “experience . . . the variety of practices that characterize effective lawyering.”).

39. William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. FOR SOC. JUST. 7, 9–11 (2007).

Almost two decades ago, Professor David Barnhizer authored an article entitled “The Justice Mission of Law Schools.”⁴⁰ He began by observing that “[m]ost faculty in American law schools would deny the appropriateness of any mission that requires them to either understand or advance justice.”⁴¹ Professor Barnhizer explained further that the minority of faculty who, at that time, would support the idea that social justice is a proper mission of law schools “would dissipate abruptly if anyone attempted to be specific in terms of the obligation.”⁴² While both of Professor Barnhizer’s observations are probably as true today as they were nearly two decades ago, the case for making justice a core concern of legal education remains compelling.

Much, if not most of what we celebrate as a people is anchored to our devotion to the law and the enduring struggle to achieve a more just society. From our founding as a nation, to our rebirth in 1865, and continuing through the modern civil rights era, the most distinctive ingredient of our national ethos has been a maturing concern for justice. The current struggle over extending a full measure of civil rights to gay men and women, including guaranteeing them full participation in our civil institutions, reflects our continuing national discourse on justice.⁴³ If this is indeed true, then it would seem that justice has a great deal to do

40. David Barnhizer, *The Justice Mission of American Law Schools*, 40 CLEV. ST. L. REV. 285 (1992).

41. *Id.* at 286. See also Wizner, *Is Learning*, *supra* note 18, at 583 (discussing how many law professors would claim that moral instruction is inappropriate and arguing “most law school graduates . . . [enter] the profession with only the vaguest sense of their . . . obligations to the public.”).

42. Barnhizer, *supra* note 40, at 286 n.3. The Carnegie Study observed that “efforts to add new requirements are almost universally resisted, not only in legal education but in professional education generally” CARNEGIE STUDY, *supra* note 38, at 190.

43. See Patrick Healy, *Hopefuls Differ as They Reject Gay Marriage*, N.Y. TIMES, Nov. 1, 2008, at A1 (discussing the same-sex marriage views of then Senator Barack Obama and Senator John McCain); Jessie McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1 (discussing the passage of same-sex marriage bans in Arizona, California, and Florida). See also *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (stating that “limiting the designation of marriage to a union ‘between a man and a woman’ [in California’s state statute] is unconstitutional”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008) (“[G]ay persons are entitled to marry the . . . same sex partner of their choice.”); *Goodridge v. Mass. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (“Limiting the protections, benefits, and obligations of civil marriage to opposite-sex couples violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”).

with the mission of law schools.⁴⁴ Technical and professional competency divorced from an understanding and concern for justice produces a profession ill prepared to respond to the “concrete realities” of the human condition.⁴⁵ And a lack of interest in the latter produces and perpetuates the type of social and economic conditions that tear at the very foundations of our democracy. The analytical, technical, and practice skills that form the centerpiece of a legal education should be informed by a concern for justice. Almost four decades ago, the Supreme Court’s decision in *Goldberg v. Kelly*⁴⁶ gave eloquent voice to the social and moral conundrum of poverty amidst plenty. In *Goldberg*, Justice William Brennan, writing for the majority, explained:

From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to

44. See John O. Calmore, “Chasing the Wind”: Pursuing Social Justice, Overcoming Legal Mis-Education, and Engaging in Professional Re-Socialization, 37 LOY. L.A. L. REV. 1167 (2004) (noting “social justice is imperative for lawyers to heed their public calling in the truest sense.”); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 38–39 (1995) (discussing various arguments that “support the notion that lessons of social justice are a necessary part of legal education generally, and clinical education in particular.”).

45. Justice Brennan used the term, “concrete realities,” to explain his decision in *Goldberg v. Kelly*, 397 U.S. 254 (1970), as “an expression of the importance of passion in governmental conduct, in the sense of attention to the concrete human realities at stake.” William J. Brennan, Jr., *Reason, Passion, and “The Progress of the Law,”* 10 CARDOZO L. REV. 3, 20 (1988). See also Steven Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on Goldberg v. Kelly*, 10 CARDOZO L. REV. 179, 179 (1988) (quoting Brennan, *supra* at 11) (noting that “judging . . . involves the interaction of reason and passion, of logic and experience, in a ‘dialogue between head and heart.’”).

46. 397 U.S. 254 (1970).

“promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”⁴⁷

Goldberg v. Kelly, however, offers us more than just an eloquent and thoughtful expression of the role and responsibility of government to act for the good of its people—it also teaches us about lawyering and the public good. That is, the Supreme Court’s decision in *Goldberg* teaches us that injustice and poverty are inextricably linked. Justice Hugo Black, who dissented in *Goldberg*, offered sharp disagreement with the majority’s recourse to the Fourteenth Amendment as a source for procedural protections for the poor.⁴⁸ Justice Black also expressed great alarm over what he saw as an unwarranted intrusion into a field of state operation.⁴⁹ Nevertheless, Justice Black recognized the pressing need to address what he described as “[t]he dilemma of the ever-increasing poor in the midst of constantly growing affluence”⁵⁰

No doubt, the call for our law schools to take on a social justice mission is not a new one. However, it remains a mission that has yet to be accepted by most law schools. Charles Hamilton Houston’s stewardship of Howard University Law School offers the clearest, if not the best, example of what can be accomplished when a law school is institutionally committed to social justice.⁵¹ Houston inculcated his students at Howard with the importance of lawyering for the public good and prepared and trained his students to challenge and dismantle segregation.⁵² Thurgood Marshall,⁵³ Robert Carter,⁵⁴ Oliver Hill,⁵⁵ and Spottswood

47. *Id.* at 264–65. Justice Scalia, however, would characterize this type of decision-making as “abstract moralizing.” See Bradley Vasoli, *Scalia Lambasts “Abstract Moralizing,”* PHILADELPHIA BULL., Oct. 28, 2008, at 3.

48. *Goldberg*, 397 U.S. at 275–77 (Black, J., dissenting).

49. *Id.* at 279.

50. *Id.* at 272.

51. See RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 128–145 (Alfred A. Knopf, Inc. 1976). See also MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936–61* (Oxford Univ. Press 1994).

52. See Roger A. Fairfax, Jr., *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17, 21–22 (1998) (quoting Charles Hamilton Houston, 27 NEW ENG. L. REV. 595, 599 (1993)) (noting that Houston’s “unrelenting vision of creating a school for the training of ‘Black lawyers who would actively and aggressively represent and advocate for the rights of the Black citizenry’”). See also KLUGER, *supra* note 51, at 128 (“Howard Law School became a living laboratory where civil-rights law was invented by teamwork.”).

53. Thurgood Marshall graduated first in his class at Howard Law School and later became the chief attorney and legal strategist for the NAACP in the fight to

Robinson⁵⁶ all studied at Howard under Charles Hamilton Houston.⁵⁷ Each of these men went on to change the course of our nation's history by using their legal training as lawyers for the NAACP in its historic fight to help dismantle Jim Crow segregation.⁵⁸ Professor Linda Greene, who explored the social mission of law schools nearly twenty years ago, pointed to the work of Jean and Edgar Cahn at Antioch Law School as another example "of the possibility of a law school's institutional responsibility for justice."⁵⁹ The Cahns, who were the founding co-deans, established Antioch Law School to provide access to underserved, impoverished communities and used clinical education as a key ingredient in their educational model.⁶⁰ Social justice was the

end segregation. KLUGER, *supra* note 51, at 128, 214. Marshall went on to argue *Brown v. Board of Education*, 347 U.S. 483 (1954). President John F. Kennedy appointed Marshall to the federal appellate bench in 1961, and four years later President Lyndon Johnson convinced Marshall to step down and serve as Solicitor General. KLUGER, *supra* note 51, at 760. Two years later, President Johnson made the historic nomination of Thurgood Marshall to the United States Supreme Court. In 1967, Marshall became the first African American to serve on the high court. *Id.*

54. Robert Carter, like Thurgood Marshall, was a graduate of Howard University's law school. JACK GREENBERG, *CRUSADERS IN THE COURT: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION* 34 (Basic Books 1994). Carter was Thurgood Marshall's first assistant counsel at the Legal Defense Fund. *Id.* Carter would later be appointed to the federal bench as a United States District Court Judge in New York. KLUGER, *supra* note 51, at 775.

55. Oliver Hill graduated in 1933 from Howard University Law School. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* 28 (Oxford Univ. Press 2001). Hill was one of only a handful of African Americans admitted to the Virginia Bar in the 1950s. *See* KLUGER, *supra* note 51, at 128. Hill was counsel in a number of major Legal Defense Fund school segregation cases in Virginia. *Id.* He would become the first African American elected to the city council of Richmond, Virginia. *Id.*

56. Spottswood Robinson, III was another Howard Law School graduate who was an important participant in many Legal Defense Fund cases. GREENBERG, *supra* note 54, at 35. Robinson became dean of Howard's law school in 1960 and was later appointed to the federal appellate bench. *Id.*

57. KLUGER, *supra* note 51, at 128, 273, 471. *See also* Professor Florence Wagman Roisman, Presentation at Great Lawyers and Judges Series, Indiana University School of Law—Indianapolis (Feb. 12, 2002) (presenting the life, contributions, and influence of Charles Hamilton Houston in the history of the United States).

58. *See* GREENBERG, *supra* note 54, at 26–41.

59. Linda Greene, *The Justice Mission of the Law Schools*, 40 CLEV. ST. L. REV. 353, 354 (1992).

60. Laura C. Lawson, *Antioch Law School: Business as Un-usual*, 38 NLADA BRIEFCASE, 13–14 (Summer 1981).

hallmark of Antioch Law School's educational mission.⁶¹

In 2008, the issue of social justice and its role and place in legal education continued to occupy the attention and concern of poverty law scholars.⁶² Professor Marie Failing, in examining the role and place of poverty law in the mission of the law school, offers a cautious but hopeful vision for the future:

[t]he poor in our society, however, pose a compelling challenge to the American legal community. Not only have they been the subject of intense academic study, not only do they live in one of the richest nations in human history (whose social, economic, and educational benefits are supposed to trickle down to them), but they also live in a country whose dedication to the protection of human rights through law is among the highest in history. In such a setting, the widespread existence of the desperate poor . . . is a profound moral puzzle.

. . . Whether law schools, as teachers to the bar, look upon their work as educating public citizens, skilled technicians, counselors, advocates, or transformational leaders, the infusion of poverty law and poor clients into the whole life of the law school offers some hope that passion, responsibility, and optimism will win out over denial, withdrawal, and skepticism. That, itself, should be worth the candle.⁶³

Despite the fact that for several decades there have been continuing calls to take on a social justice mission, the hard truth is that these calls have mainly gone unheeded. Ultimately, however, whether law schools and the academy choose to take on this mission is a value judgment.⁶⁴ This judgment is a collective one

61. *Id.*

62. *See, e.g.,* Marie A. Failing, Symposium, *A Home of Its Own: The Role of Poverty Law in Furthering Law Schools' Missions*, 34 FORDHAM URB. L.J. 1173, 1175 (2007) (arguing that poverty law can be a key piece in the curriculum of law schools that define their mission, at least in part, as educating lawyers as public citizens, skilled technicians, skilled counselors, advocates on behalf of a cause, or as transformational leaders).

63. *Id.* at 1218.

64. *See, e.g.,* Wizner, *Is Learning*, *supra* note 18, at 591 ("Law schools, and particularly law teachers, have a 'moral responsibility' to democratize our legal culture. They must teach and inculcate in their students the professional obligation of providing and supporting legal services for the poor."). *See also* Russell Engler, *From the Margins to the Core: Integrating Public Service Legal Work Into the Mainstream of Legal Education*, 40 NEW ENG. L. REV. 479, 485 (2006) ("Numerous studies reveal the extent to which the values of law students are shaped by their law school experiences and those experiences typically push students away from,

that has been made not only by law schools and the academy but also by the profession. Inevitably, the path of academic achievement in law schools leads to coveted positions with private law firms.⁶⁵ There is a well-traveled path between high academic achievement in law school and practice at large firms, both of which represent principally corporate and commercial interests.⁶⁶

Almost ninety years ago in a series of lectures to his first-year law students at Columbia University, Professor Karl Llewellyn examined the use of the law as a route to material success.⁶⁷ Llewellyn observed:

There is a brand of lawyer for whom law is the making of a livelihood, a competence, a fortune. Law offers means to live, to get ahead. It is so viewed. Such men give their whole selves to it, in this aspect. Coin is their reward. Coin makes it possible to live. Coin is success, coin is prestige, and coin is power.⁶⁸

rather than toward, public interest work.”).

65. See Frances Ansley, *Starting With the Students: Lessons from Popular Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 7, 29 (1994) (pointing out that the traditional grading system operates to identify students for large firm work and that “placement offices devote a great deal of time and energy to attract large firms for interviews and to smooth the path for a select number of . . . graduates into slots in those firms.”); Maria L. Ciampi, *The I and Thou: A New Dialogue for the Law*, 58 U. CIN. L. REV. 881, 899 (1990) (“Students frequently compete for the highest grades solely to be able to go to the large firms which pay enormous salaries.”); David C. Vladeck, *Hard Choices: Thoughts for New Lawyers*, 10 KAN. J.L. & PUB. POL'Y 351, 354 (2001) (observing that the poor's lack of access to legal counsel “begins in law schools, and our nation's law schools are at least complicit in building the hydraulic pressure on young graduates to seek out corporate law firm jobs . . .”).

66. See Vladeck, *supra* note 65, at 354–55. See also D'Alemberte, *supra* note 36, at 369–70 (“By screening law students and sorting them out, we legal educators ease the burden of selections for law firms. By socializing law students to think that they should go where the ‘interesting work’ is, we precondition them to accept this employment.”); Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359, 397 (1990) (“Students are taught—implicitly, if not explicitly—that to be truly successful, one must earn high grades, write on law review, and clerk for prestigious firms during the summer.”); Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443, 447–48 (1992) (“Most of the resources of the placement offices of American law schools are devoted to assisting students find private employment. . . . For most schools, a prime measure of success is the percentage of graduates who are initially employed in large, prestigious law firms.”).

67. See, e.g., K. N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* (1960).

68. *Id.* at 141.

Nearly eight decades later, this remains true.⁶⁹ In fact, the notion that the law is a pathway to power and prestige is perhaps more true today than at any time before.⁷⁰ Law schools, however, can and should do more to offer all students a different path to travel through the law and through life—a path along which coin is not the standard measure of either success or prestige. This effort, however, should not be directed principally for the benefit of students who have already chosen not to pursue coin as their reward. No, the effort must be directed for the benefit of all law school students as well as the institutional health of the law school itself. This requires making justice a concern for all lawyers and elevating justice as a central concern of legal education.

Most law schools, however, usually confine matters of justice and the legal status of the poor to legal clinics and a few courses and seminars that concern legal philosophy, poverty, race, gender, or disability. To this extent, the subject of poverty and the law in today's law schools is ghettoized.⁷¹ No doubt, clinical education today is a component of virtually every law school curriculum,⁷² but

69. See, e.g., Vladeck, *supra* note 65, at 354–55; Quigley, *supra* note 39, at 9–11. There is evidence, however, that a substantial number of students enter law school imbued with idealism and a high level of interest in social justice. See Tan N. Nguyen, *An Affair to Forget: Law School's Deleterious Effect on Student's Public Interest Aspirations*, 7 CONN. PUB. INT. L.J. 251, 256 (2008) (examining why the level of interest in public interest work among law students declines by the final year of law school and arguing one reason for the decline in student interest in public interest law careers is that “[l]aw school faculty often explicitly convey a negative image of what it means to practice public interest law to their students.”).

70. Rose, *supra* note 66, at 447–48; Vladeck, *supra* note 65, at 355. See also Jill Chaifetz, *The Value of Public Service: A Model for Instilling a Pro Bono Ethic in Law School*, 45 STAN. L. REV. 1695, 1698 (1993) (noting that content of law school course offerings signals a heavy corporate bias, which serves to guide the flow of the majority of students into corporate law).

71. See Wizner, *Is Learning*, *supra* note 18, at 586 (“Clinics are not integrated into the mainstream curriculum. . . . [and] [i]n effect the law school division between clinical and non-clinical education replicates the dual system of justice: law for the affluent as distinct from law for the poor, the mainstream curriculum as distinct from the clinical curriculum.”).

72. See DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY (2008), available at <http://www.csale.org/CSALE.07-08.Survey.Report.pdf> [hereinafter CSALE SURVEY]. The CSALE Survey sought a range of information on law school clinical and field placement programs from all 188 ABA fully accredited law schools. *Id.* at 1–2. Survey responses were received from 145 schools. *Id.* at 1. Both overall enrollment at each responding school and clinical enrollment information was collected. *Id.* at 2. See also James H. Backman, *Practical Examples for Establishing an Externship Program Available to Every Student*, 14 CLINICAL L. REV. 1, 4–11 (2007) (providing an overview of in-house clinical programs and externship involvement,

most law school clinics give a relatively few number of students⁷³ limited exposure to the pressing legal plight and the many burdens that fill the lives of the poor, and even more limited exposure to examining the relationship between poverty and the law.⁷⁴ That said, it should indeed be noted and celebrated that many law school clinics have done and continue to do enormously important social justice impact work, and many clinical programs provide invaluable individual representation both civilly and criminally.⁷⁵ But by and large, too few students can participate⁷⁶ and too many schools and students view a clinical experience more as an opportunity to develop practice-ready skills than as an inquiry into the role and function of justice, or the confluence of poverty and the law.⁷⁷

and explaining the growth in externship placements). Professor Backman draws on data reported in the ABA and Law School Admission Council's annual *Official Guide to Law Schools*. *Id.*

73. CSALE SURVEY, *supra* note 72, at 10 (revealing that at many schools, only a relatively small percentage of enrolled students actually participate in live in-house clinics). See also Wizner, *Is Learning*, *supra* note 18, at 586 (noting the lack of funding and personnel for current law school clinical programs).

74. See Meredith J. Ross, A "Systems" Approach to Clinical Legal Education, 13 CLINICAL L. REV. 779, 779–81 (2007) (explaining a fundamental debate in clinical education is whether the goal of a clinical program should be skills acquisition or social justice); Stephen Wizner, *Beyond Skills Training*, 7 CLINICAL L. REV. 327, 327–28 (2001) (explaining the "proper objective of clinical legal education is to teach students about using the law to pursue social justice . . . [and that] client-centered legal services work is as important a way of teaching about social justice as law reform litigation.").

75. See Scharf, *supra* note 38, at 243–46 (noting the successes of the Southern New England School of Law Immigration Law Clinic). See also BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BUNCH OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* 307 (Scribner 2005) (chronicling human rights litigation prosecuted by law students at Yale Law School under Professor Harold Koh, and describing how in 2001, Professor Koh told a new group of clinical students at the first meeting that "[t]his course . . . is about saving people. And not just people you'll be helping, but all of you."); Arturo J. Carillo, *Bringing International Law Home: The Innovative Role of Human Rights Clinics in the Transitional Legal Process*, 35 COLUM. HUM. RTS. L. REV. 527 (2004) (analyzing the successes of human rights law school clinics); David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 237 (2003) (noting most clinical programs provide individual direct representation and noting a number of instances of law school clinics doing controversial impact cases); Jan Stiglitz, Justin Brooks & Tara Shulman, *The Hurricane Meets the Paper Chase: Innocence Projects New Emerging Role in Clinical Legal Education*, 38 CAL. W. L. REV. 413 (2002) (discussing the successes of the California Innocence Project).

76. Wizner, *Is Learning*, *supra* note 18, at 586. See also CSALE SURVEY, *supra* note 72, at 7.

77. Wizner, *Is Learning*, *supra* note 18, at 591–92. See also Sameer M. Ashar,

There remains the question why a subject that in the words of Justice Scalia is “made-up,”⁷⁸ should occupy such a coveted space in today’s law school curriculum, let alone support a new and controversial institutional mission? This question in some measure touches upon the problem of defining poverty law. First, it should be pointed out that Justice Scalia’s criticism rests on the premise that courses that he would consider serious are not made-up. However, that premise is flawed because the schema of our common law system is, so to speak, *all made-up* in the first instance.⁷⁹

You can quite literally throw a dart at a historical map of the common law to demonstrate this point. Whether the subject is administrative law, tort law, environmental law, consumer law, constitutional law, remedies, civil procedure, property law, corporations or any other subject area, “made-up stuff” is what gives these and all other doctrinal areas of study content and continuing vitality. Consider how Justice Scalia’s criticism fares against the development and evolution of strict liability law.⁸⁰ Just more made-up stuff? The concept of minimum contacts as a central organizing principle in the ordering of personal jurisdictional concerns,⁸¹ and the *Mathews v. Eldridge* due process three-factor balancing test,⁸² and equal protection scrutiny analysis in constitutional law,⁸³ are all informed by what could readily be labeled as “made-up stuff.”

Admittedly, a lack of commonly recognized or agreed substantive boundaries denies poverty law the status of a neatly fenced-off doctrinal subject area. Poverty law, however, as either an

Law Clinics and Collective Mobilization, 14 CLINICAL L. REV. 355, 357 (2008) (arguing that “[p]oor people are not served well by the kinds of advocacy currently taught and reinforced in most law clinics.”).

78. Pallasch, *supra* note 2.

79. See Roger J. Traynor, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 52 (Monrad G. Paulsen ed., Columbia Univ. Press 1959) (stating “[e]very basic precedent was thus once made up out of whole cloth woven by a judge.”); M. Gregg Bloche, *The Invention of Health Law*, 91 CAL. L. REV. 247, 249 (2003) (discussing how courts by default “are inventing health law.”).

80. See generally Stanley A. Twardy, Jr., *Justice Roger J. Traynor and the Development of Strict Liability in Product Liability Cases*, 53 CONN. B.J. 423 (1979) (analyzing Justice Traynor’s development of strict liability in the context of defective products).

81. *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

82. 424 U.S. 319, 335 (1976).

83. See *Shapiro v. Thompson*, 394 U.S. 618, 660–61 (1969) (Harlan, J., dissenting) (criticizing majority’s use of fundamental rights strict-scrutiny analysis).

area of study or an area of practice, has never been clothed with tradition or simplicity. But these facts should present neither an instructional obstacle nor a pedagogical justification for not incorporating such a course into the required curriculum. It matters not so much precisely what a particular course's fine details are as much as that the course places squarely before students the taunting symmetries of the law. The purpose of requiring students to take a poverty law course is to expose them to the complexity of the legal interests of the poor, the promise of the law as an institution capable of addressing and remediating injustice, and the richness of lawyering on behalf of the poor in a nation committed by its written constitution to equal justice.⁸⁴

Because a picture is worth a thousand words, I draw upon my own recent experience in teaching poverty law in a classroom setting to sketch a few illustrations of how professors can teach students both competency and expose students to the taunting symmetries of the law. One of the cases I assign in my poverty law class is *Department of Housing and Urban Development v. Rucker*.⁸⁵ In *Rucker*, the Supreme Court held that a statutory provision that Congress enacted, and which amended the National Housing Act, permits the eviction of an innocent public housing tenant when another member of the tenant's family, guest, or other person under the tenant's control has engaged in drug-related criminal activity.⁸⁶ Using the *Chevron* doctrine, the Supreme Court found that Congress indeed intended to allow the eviction of innocent tenants for the drug offenses of other persons and that the eviction of innocent tenants does not present any constitutional problems.⁸⁷

84. See generally E. Clinton Bamberger, Jr., *Walking Against the Wind*, 38 NLADA BRIEFCASE, 10–11 (Summer 1981) (explaining the challenges and rewards of lawyering for the nation's poor).

85. 535 U.S. 125 (2001).

86. *Id.* at 130. See also 42 U.S.C. § 1437d(l)(6) (2005). Following *Rucker*, the statute was amended in a number of ways. 42 U.S.C. § 1437d(l)(6)(A)–(E) (2005). The statute still permits eviction as authorized under *Rucker* but offers protections for tenants, their family members, and guests or other persons under a tenant's control who are victims of domestic violence. *Id.* The domestic violence exception to the statute has its limits. If the domestic violence poses an actual and imminent threat to other tenants or employees, the statute permits the housing authority to terminate the tenant's lease. *Id.*

87. *Rucker*, 535 U.S. at 136. The Supreme Court first established the *Chevron* doctrine in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

I devote one class session to studying and exploring the legal analysis in *Rucker* and a second class session on how it bears on the interests of the poor and the abilities of lawyers to protect those interests. The first class includes a conventional exploration of the facts and discussion of the Court's legal analysis and the arguments raised by the parties. The discussion includes an examination of the Court's application of the *Chevron* doctrine, how it differed from the Ninth Circuit's application, and the Court's rejection of the tenants' due process concerns.⁸⁸ Fortunately, one or more students in the class always believe that the Court correctly decided the case, that it was a fair decision, and that Congress has the right to take tough measures to combat crime and drugs, especially when the government provides a family housing. From there, I move to a discussion of the 1986 Florida Supreme Court decision in *Florida Bar v. Rosen*.⁸⁹

In *Rosen*, the Florida Supreme Court reviewed the propriety of a three-year suspension given to a Florida attorney who had been convicted of cocaine drug-trafficking charges.⁹⁰ The Florida Bar disagreed with the referee's recommendation for a three-year suspension and pressed for disbarment on appeal.⁹¹ The Florida Supreme Court, however, found disbarment too severe under the circumstances of the case.⁹² In reaching this conclusion, the court explained that the "facts illustrat[ed] yet *another tragedy* related to cocaine abuse."⁹³ Central to the Florida Supreme Court's decision in *Rosen* was the attorney's accomplishments in law school, his skill and reputation as a tax lawyer, his authorship of articles on tax matters, and his involvement as a lecturer in continuing legal education programs.⁹⁴ The Florida Supreme Court then contextualized the lawyer's loss of control and involvement in drug trafficking:

As is so often the case, Rosen's productivity as a member of society precipitously plummeted as he became increasingly addicted to free-base cocaine. To his credit, he quietly wound up his law practice towards the end of 1981, when he no longer felt able to adequately protect

88. *Rucker*, 535 U.S. at 130, 135–36.

89. 495 So. 2d 180 (Fla. 1986).

90. *Id.* at 181.

91. *Id.*

92. *Id.*

93. *Id.* (emphasis added).

94. *Id.*

the best interests of his clients. Unfortunately, however, he had by then lost the ability to exercise such care for himself, and continued to withdraw into the nightmarish nether-world of cocaine addiction until he finally became involved in drug trafficking in 1982.⁹⁵

Unlike the Florida Supreme Court in *Rosen*, the United States Supreme Court in *Rucker* was far less forgiving of the troubles of sixty-three-year-old Pearlle Rucker and her adult disabled daughter who was arrested for possession of crack cocaine several blocks from Pearlle's Oakland Housing Authority apartment complex.⁹⁶ Pearlle Rucker had called the Oakland Housing Authority complex home for almost two decades, but unlike the attorney in *Rosen*, she had no professional standing or accomplishments that were highlighted by the Court.⁹⁷ More immediately, however, unlike the attorney in *Rosen*, Rucker herself was entirely innocent.⁹⁸

The contrast between how *Rucker* and *Rosen* treated drug use and drug-related criminal activity could not be sharper. Using that contrast, I ask the class to consider "why?" Was it because Rucker was poor and black and Rosen was white and a member of a privileged profession? How, if at all, did poverty burden the decisional outcome in *Rucker*? How did Pearlle Rucker's status as a poor American influence the result in her case? Do the ethics of drug use turn on a person's station in life?

The class is then asked to consider and compare the treatment of Pearlle Rucker and her disabled daughter with the treatment of the twenty-four-year-old daughter of former Florida Governor Jeb Bush, who a few months before the *Rucker* decision had been arrested for attempting to buy the drug Xanax with a fraudulent prescription.⁹⁹ Within hours of his daughter's arrest, Governor Bush asked the public to respect his privacy, and quickly thereafter, his daughter entered a drug treatment program.¹⁰⁰ The class materials for *Rucker* also include an article that details Chief Justice William Rehnquist's own struggle with dependence on and misuse of the prescription sedative Placidyl during his tenure on the

95. *Id.*

96. *Rucker v. Davis*, 237 F.3d 1113, 1117, 1124 (9th Cir. 2001).

97. *See id.* at 1113-42.

98. *Id.*

99. Dana Canedy, *Jeb Bush's Daughter Is Arrested on Charge of Faking Prescription*, N.Y. TIMES, Jan. 30, 2002, at A12.

100. *Id.*

Supreme Court.¹⁰¹ I ask the class if these comparisons are fair and whether they are in any way relevant or revelatory about how we treat the poor differently in terms of legal rights and legal burdens.

Next, I ask the class why Congress does not craft a one-strike policy for homeowners who claim a mortgage interest deduction on their federal income tax statement.¹⁰² I ask why not implement a policy that bars any taxpayer from claiming the mortgage interest deduction if any member of the family, a guest, or other person subject to a family member's control, engages in drug-related activity. As in cases of public housing tenants who face eviction, there would be no innocent homeowner defense and the person accused of drug-related activity need not be convicted to trigger the one-strike policy.¹⁰³ These questions seek to encourage students to think about how the same or similar conduct can be viewed and treated in radically different ways depending on the affected party's social and economic status.¹⁰⁴

Following an examination of these issues, I ask the students to consider how they would defend a public housing client facing eviction based on the drug-related or criminal activity of another person, perhaps a child or guest. I return to a discussion of *Rucker* to try and get the students to think about how they would defend a client facing eviction under a standard that amounts to a form of strict liability.¹⁰⁵ I ask them, "in light of *Rucker*, what defenses remain available?" In *Rucker*, the Supreme Court noted that the

101. Justice Rehnquist authored the majority opinion in *Rucker*. See Alan Coppperman, *Sedative Withdrawal Made Rehnquist Delusional in '81*, WASH. POST, Jan. 5, 2007, at A1. See also David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000) (documenting Justice Rehnquist's overdependence on Placidyl).

102. See Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665, 673 (2002) ("The tax advantages associated with home ownership are by far the largest federal housing subsidies, many times greater than the housing subsidies for low-income people.").

103. Under 24 C.F.R. § 966.4(l)(5)(iii)(A) (2001), a housing authority may evict a tenant based on a covered person's (family member, guest, or other person under the tenant's control) criminal activity "regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction."

104. See, e.g., Robert Hornstein, Treena Kaye, & Daniel Atkins, *One Strike for the Poor and How Many for the Rest of Us?*, LEGAL TIMES, Mar. 18, 2002, at 66.

105. *Rucker v. Davis*, 535 U.S. at 134. See also Tamara R. Piety, *The War on the Poor—News from the Front: Department of Housing and Urban Development v. Rucker*, 38 TULSA L. REV. 385 (2002). See also Robert Hornstein, *Mean Things Happening in This Land: Defending Third Party Criminal Activity Public Housing Evictions*, 23 S.U. L. REV. 257, 266 (1996).

regulations promulgated by the Department of Housing and Urban Development confer discretion on local public housing authorities to decide whether an eviction should be prosecuted.¹⁰⁶ We then discuss whether an abuse of that discretion gives rise to a defense based on the regulation conferring such discretion. In the course of the discussion, we examine the usefulness of requesting a jury trial in these types of evictions.

After exhausting an examination of what, if any, traditional defenses remain available,¹⁰⁷ I ask them to prepare a voir dire examination for the next class. In that second class, I conduct a voir dire exercise based on a post-*Rucker* criminal activity eviction. For this exercise, I have the entire class serve as the venire panel. Individual students take turns conducting a voir dire examination of the class either as counsel for the housing authority or as counsel for the tenant. The class, however, is told that they are to wear two hats, one as a member of the venire panel and one as opposing counsel. The exercise permits any student to tender an objection to a question posed by the student conducting the voir dire examination. Using *Rucker* as the legal framework, this jury selection exercise brings to the fore issues of class, social status, bias, and, very clearly, the concrete burdens that the law places on an impoverished tenant. Students are confronted with the practical difficulties that inhere in defending the poor, including trying to fashion a viable defense and selecting a jury that will sit in judgment on a poor person's legal rights.

Rucker, however, offers but one example of how poverty law issues can inform instruction. In the context of contracts, the use of remedy-stripping provisions that compel a forfeiture of jury trial rights, waive or limit damage remedies, restrict the recovery of costs and fees, or shift liability for fees and costs,¹⁰⁸ and the use and application of the doctrine of unconscionability,¹⁰⁹ offer many types of opportunities to examine poverty law issues. Professor Paul Carrington, in his article *Unconscionable Lawyers*, argues that lawyers

106. *Rucker*, 535 U.S. at 129, 134. See also 24 C.F.R. § 966.4(l)(5)(l)(i) (2001) (codified as amended at 24 C.F.R. § 966.4(l)(5)vii(B)–(D) (2008)).

107. See *Boston Hous. Auth. v. Garcia*, 871 N.E.2d 1073, 1080 (Mass. 2007) (holding special circumstances defense under state law was preempted, but the court left open the possibility a tenant could defend on the basis of an abuse of discretion defense).

108. See David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F.L. REV. 49, 50 (2003).

109. See, e.g., *Delta Funding Corp. v. Harris*, 912 A.2d 104, 112–13 (N.J. 2006).

have a duty to avoid using oppressive remedy-stripping clauses.¹¹⁰ Carrington explores the contours of the duty, the potential for substantive liability, and the moral restraints on lawyers drafting and invoking oppressive remedy-stripping clauses.¹¹¹ I assign the article and ask the students to consider the ethical implications of the use of these types of contract provisions. I pose the question in the context of a hypothetical representation. Professor Carrington's article and his arguments offer a rich opportunity to examine a wealth of issues, including the proper role and responsibilities of lawyers as advocates, the impact of remedy-stripping devices on the poor's access to the courts, and the proper role and function of the courts in enforcing these types of provisions.

We first examine the ethical question through the prism of the lawyer's duty to his client. The client might be a rent-to-own furniture company, a used car dealer, a bank, or a private landlord. Next, I ask the class to consider what, if any, duty exists to third parties and to the public. I narrow the question to focus on the ethical implications of lawyers invoking provisions that, by design, are intended to deny persons access to the courts, deprive them of important procedural rights, and foreclose any meaningful judicial remedies. The class materials include selected Florida Rules of Professional Conduct.¹¹²

Next, the class is asked whether the rules have any application. In this context, we explore how these types of remedy-stripping provisions burden or benefit the adjudicative process and how they burden the ability of persons to defend lawsuits or to press claims for affirmative relief. We also consider how wealth and poverty bear on the enforcement and efficacy of these provisions. I ask the class how, if at all, remedy-stripping provisions weigh more heavily on the poor than on others whose rights are similarly burdened or extinguished by the use of such provisions. The discussion forces students to reconcile a number of competing professional obligations and moral impulses. Professor Carrington's insights

110. Paul D. Carrington, *Unconscionable Lawyers*, 19 GA. ST. U. L. REV. 361, 361–62 (2002).

111. *Id.* at 364, 370, 379, 384, 391.

112. See FLA. R. PROF'L CONDUCT R. 4-3.4 (fairness to opposing party); FLA. R. PROF'L CONDUCT R. 4-4.4 (respect for the rights of third persons); FLA. R. PROF'L CONDUCT R. 4-8.4 (conduct classified as misconduct). The Florida Rules of Professional Conduct are found in Chapter 4 of the Rules Regulating the Florida Bar.

place in sharp relief for students the moral dimensions of their responsibilities as lawyers, the limits of zealous advocacy, and also how wealth and poverty can weigh heavily on the calculus of justice.

A poverty law course offers virtually unbounded opportunities to examine questions of justice and equality within the crucible of practical lawyering concerns. But these opportunities are not confined exclusively to a classroom poverty law course. Professor Failing explains that “the ways in which poverty law can be infused into the life of a law school that trains its students to be public citizens are manifold.”¹¹³ There are just as many opportunities to build poverty law issues and concerns into conventional courses such as torts, property law, remedies and virtually any other course.¹¹⁴ In property courses, landlord-tenant statutory schemes that favor property owners and disadvantage the poor offer useful teaching tools to examine poverty law issues.¹¹⁵ Tort law and tort reform implicate a range of poverty law concerns, including the disparate impact that damage limitations have on the poor and minorities.¹¹⁶ Poverty law and social justice concerns need not be ghettoized—they can be a vital and integral part of the law school curriculum.

Returning to Justice Scalia, in 2008, he sat for an interview with C-Span founder Brian Lamb to promote his book on legal writing, *Making Your Case: The Art of Persuading Judges*, which he co-authored with Professor Bryan Garner.¹¹⁷ During the course of the interview, Justice Scalia was asked how he would rate lawyers who have appeared in the Supreme Court.¹¹⁸ His answer to that question

113. Failing, *supra* note 62, at 1188.

114. See, e.g., Helen Hershkoff, Symposium, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 FORDHAM URB. L.J. 1325, 1325 (2007) (examining “whether and how to integrate issues of poverty and inequality into the standard first-year course on civil procedure.”).

115. *Lindsey v. Normet*, 405 U.S. 56, 72–73 (1972).

116. Joanne Doroshow & Amy Widman, *The Racial Implications of Tort Reform*, 25 WASH. U. J.L. & POL’Y 161, 161–62 (2007). See also JOHN T. NOONAN, JR., PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 111–51 (2002) (asking if Helen Palsgraf’s poverty could have been a decisive factor in the outcome of her famous 1928 case, *Palsgraf v. Long Island Railroad Company*, 162 N.E. 99 (N.Y. 1928)); Susan Carle & Michelle Lapointe, *Short Notes on Teaching About the Micro-Politics of Class, With Examples from Torts and Employment Law Casebooks*, 56 BUFF. L. REV. 1129 (2008).

117. ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* (West Law School 2008).

118. Q&A: Justice Antonin Scalia, U.S. Supreme Court, <http://www.q-and-a.org/Transcript/?ProgramID=1178> (last visited Jan. 15, 2009).

offers yet another measure of insight into how he values the legal interests of the poor:

Now and then you get somebody who's really quite bad, but more often I am startled by the fact that this young woman who is a, you know, public defender from Podunk is so good, is so smart, and is so competent, and I ask myself, "*What is she doing, you know, being a public defender in Podunk? Why isn't she out inventing the automobile or, you know, doing something useful?*" I mean, I – you know, I'm being sarcastic, I suppose, but it is the fact that we devote, in my view, too many of our best and brightest minds to the law.¹¹⁹

Justice Scalia's suggestion, that lawyers who devote their lives to the cause of justice by representing the poor and the disenfranchised in small and out-of-the-way towns and cities across the country are not doing important work that benefits society, offers a cramped understanding of the promise of our legal institutions. An eloquent rejoinder to Justice Scalia's questioning of why a lawyer might want to serve the poor in an obscure corner of the country was offered almost thirty years ago by Professor Clinton Bamberger in his commencement address to the 1981 graduating class of the School of Law of the University of Pennsylvania.¹²⁰ Bamberger explained to the gathered students and their families and friends: "[t]he best of a lawyer's work is to create with the law. The best of this work is to find in law rights, dignity, and status and to free these forces for people who would not have them but for the law and your application."¹²¹

Last fall I had two guest speakers in my poverty law class, both of whom are poverty lawyers. Gregory Schell has spent three decades in rural communities in Florida and on the Delmarva Peninsula helping assert rights for and give dignity to thousands of the nation's migrant farm workers.¹²² Miriam Harmatz, for nearly the same amount of time, has fought tirelessly to expand

119. *Id.* (emphasis added).

120. Bamberger, *supra* note 84, at 10.

121. *Id.* at 11.

122. In 2004, Schell was the recipient of the National Legal Aid & Defender Association's prestigious Reginald Heber Smith Award. Press Release, Nat'l Legal Aid and Defender Org., Gregory Schell Nationally Honored for Outstanding Work on Behalf of Migrant Farmworkers (2004), *available at* http://www.nlada.org/News/News_Press_Releases/2004110533281567. Schell was recognized for his many years of effective advocacy on behalf of the nation's farm workers. *Id.*

healthcare access for the poor in Florida and to protect their rights under the Medicaid Program. Harmatz has used her legal skills and intellect to give both hope and better health to thousands of sick and impoverished men, women, and children throughout Florida.¹²³ In November, Harmatz brought to life the byzantine provisions of the federal Medicaid statute through the compelling narratives of the poorest and sickest Floridians' struggles to survive.

Schell, who is the Managing Attorney of Florida Legal Services, Inc.'s Migrant Farmworker Justice Project in Lake Worth, Florida, spoke to the class in September of 2008 about the importance of legal counsel and the ways in which the poor's access to legal counsel has been burdened. Following class, two students and I took him out for lunch. On the way back, Greg Schell shared that Chief Justice John Roberts was his classmate at Harvard Law School, a very nice man, and one of the smartest persons he knew.

Greg Schell's personal connection to Chief Justice John Roberts has stayed with me, perhaps because both men clearly have brilliant legal minds and have been accomplished and gifted lawyers, yet each chose different paths in the law.¹²⁴ I suppose it is the symmetry of their gifted legal minds and the asymmetry of their career choices. Like Robert Frost's two roads that diverged in a wood,¹²⁵ Greg Schell took the road less travelled, and for thousands of the nation's impoverished farm workers, that has made all the difference.

The place and role of poverty law in today's law school curriculum is to ensure that more students take what has traditionally been the road less travelled, and to ensure that all law students understand the direct and immediate relationship between poverty and injustice, including how both burden

123. Miriam Harmatz was a co-recipient of the Florida Bar Foundation's 2006 Steven M. Goldstein Award for her work on an advocacy project aimed at insuring that impoverished Floridians receive medically necessary medications authorized under federal law and that their due process rights are protected. *See generally* 2006 Steven M. Goldstein Award for Excellence, <http://www.floridalegal.org/News/Goldstein%20Awards/Rx%20project.pdf> (last visited Mar. 3, 2009). The advocacy included both legislative advocacy and class action litigation. *Id.* Both Harmatz and Schell work for Florida Legal Services, Inc., a nonprofit legal organization that provides a range of legal services to Florida's poor. *See generally* Florida Legal Services, Inc. <http://www.floridalegal.org> (last visited Mar. 3, 2009).

124. Greg Schell has litigated numerous federal decisions that have benefited tens of thousands of migrant workers across the nation. *See, e.g.,* *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1231–32 (11th Cir. 2002).

125. ROBERT FROST, *THE ROAD NOT TAKEN* (1915).

democracy.¹²⁶ For this reason, it remains vitally important that there continue to be calls for law schools to embrace a social justice mission. It matters not whether such calls are targeted with humility¹²⁷ or raised as a social call to arms.¹²⁸ There is room for both approaches in the discourse. What matters most is that, as a nation, we continue to strive to give greater content to the meaning and understanding of equal justice. That important undertaking rightfully should be a principal responsibility of our law schools.

126. Rose, *supra* note 66, at 446 (“Access to our legal system represents access to one of the . . . vital organs of American democracy.”).

127. Failing, *supra* note 62, at 1175.

128. William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty and Wealth*, 20 WASH. U. J.L. & POL’Y 101, 162 (2006).